

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ALBERTO G. ROBLES,

Petitioner,

v.

2:16-cv-00929-MV-LF

R.C. SMITH, Warden, and HECTOR
BALDERAS, Attorney General for the
State of New Mexico,

Respondents.

**ORDER ADOPTING MAGISTRATE JUDGE'S
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

The magistrate judge filed her Proposed Findings and Recommended Disposition (“PFRD”) on June 10, 2019. Doc. 14. On June 21, 2019, petitioner Alberto Robles filed a document he titled “Petitioner Robles Amended 2254 Petition; Objections to Magistrate’s Findings and Recommended Disposition; and Request for Appointment of Counsel.” Doc. 16. In this document, Mr. Robles states that he “accepts the magistrate’s recommendations regarding his ‘mixed’ petition.” *Id.* at 1–2. Mr. Robles does not specifically object to any of the findings or recommendations in the magistrate judge’s PFRD. The Court will therefore adopt the PFRD.

Mr. Robles advises the Court that he “here by dismisses the unexhausted claims identified by the Court and will proceed with the exhausted claims.” Doc. 16 at 1. He asks the Court for leave to use his previously filed 28 U.S.C. § 2254 petition. *Id.* The Court denies this request. Mr. Robles must file a new petition within 14 days of this order **which contains only his exhausted claim.** As the magistrate judge explained:

Mr. Robles has exhausted only one of the claims he presents in his federal habeas petition: (3)(a): The trial court abused its discretion by denying him “the right to a speedy trial.” If Mr. Robles wishes to proceed with the underlying petition based solely on the exhausted claim, he must file an amended petition that

includes only this claim. He must file this amended petition within 14 days of an order adopting the PFRD.

Doc. 14 at 20. If he fails to timely file an amended petition **containing only his one exhausted claim**, the Court will dismiss his entire petition without prejudice. The Court will direct the Clerk of Court to mail Mr. Robles a new § 2254 Petition for Mr. Robles's convenience.

Mr. Robles states that “[a]t the appropriate time [he] will seek exhaustion of his unbarred, unexhausted claims in state court proceedings.” Doc. 16 at 1. The Court reminds Mr. Robles that if he files an amended petition in this Court to pursue his one exhausted claim, he likely will be precluded from filing another § 2254 petition in this Court after he exhausts his other claims in state court. *See* 28 U.S.C. § 2244(b)(2).¹

Finally, Mr. Robles asks the Court to appoint counsel and to hold an evidentiary hearing. Doc. 16 at 3. The Court finds these requests premature and will deny them without prejudice. The Court must assess Mr. Robles's amended petition and respondents' answer before it can decide whether to appoint counsel and hold a hearing.

¹ (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Wherefore,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The magistrate judge's Proposed Findings and Recommended Disposition (Doc. 14) are ADOPTED;
2. Mr. Robles shall have 14 days after being served with a copy of this order to file a new petition containing only his exhausted claim. If Mr. Robles fails to file an amended petition within this time, or if his petition addresses more than his one exhausted claim, the Court will dismiss his petition without prejudice.
3. Mr. Robles's requests for the appointment of counsel and for an evidentiary hearing are denied without prejudice.
4. The Clerk of Court is directed to mail a blank 28 U.S.C. § 2254 to Mr. Robles, along with a copy of this order.


UNITED STATES DISTRICT JUDGE